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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL BARRETT, Defendant and Appellant.	A154164 (Contra Costa County Super. Ct. No. 05-161131-8)

Defendant Michael Barrett appeals from the order revoking his probation after the trial court found he had violated its conditions by furnishing alcohol to a person under the age of 21. (Bus. & Prof. Code, § 25658, subd. (a).)[1] Barrett's sole argument on appeal is that there was insufficient evidence before the court that the person he gave the alcohol to was underage. We disagree and affirm.

I. BACKGROUND

In January 2017, Barrett pleaded no contest to misdemeanor possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and was placed on probation for a period of two years under standard terms and conditions, including that he "obey all laws." In September 2017, the Contra Costa County District Attorney's Office filed a petition to revoke Barrett's probation, alleging he had violated its conditions by unlawfully furnishing alcohol to a person under the age of 21. At the contested hearing

[1] Business and Professions Code section 25658, subdivision (a), provides that "every person who sells, furnishes, gives, or causes to be sold, furnished, or given away any alcoholic beverage to any person under 21 years of age is guilty of a misdemeanor."

on the probation violation, Detective Jon Kirkham testified that he conducted a "Shoulder Tap Operation" at a 7-Eleven convenience store on March 21, 2017. In this type of sting operation, a "minor decoy" asks an adult to buy him or her alcohol from an establishment that sells liquor. That day, Detective Kirkham was using "Curtis" as his decoy. Curtis worked at the sheriff's office as a "CSO," an employee who "assist[s] in parking tickets, code enforcements, . . . things of that nature; non law enforcement-type duties." Curtis was standing near the front entrance of the store when he began speaking to Barrett. Thereafter, Barrett entered the 7-Eleven and exited with "two tall cans of beer," one of which he gave to Curtis. Detective Kirkham then approached and spoke to Barrett, who reportedly stated: " 'How much does it cost to help a kid get a can of beer?' "

Barrett testified on his own behalf. He claimed that he thought Curtis was asking him for change outside of the convenience store on the day of the sting operation. Barrett then went into the store and bought two cans of beer for himself. However, as he exited the store, he felt "guilty" because Curtis "seemed like he was bumming change out there to try to get a beer, . . . so I felt bad for walking by with two beers, and so I gave him one of them." According to Barrett, Curtis looked "28, 30 years old." He claimed the statement he made to Detective Kirkham was sarcastic, "like a smart ass answer."

After expressly finding Barrett not credible, the trial court determined that the alleged probation violation was true. The court revoked Barrett's probation and reinstated it with certain modifications, including a six-month extension of its term, 20 hours of volunteer work, completion of a Center for Intervention program, and a probation violation fine. This appeal followed.

II. DISCUSSION

Pursuant to Penal Code section 1203.2, subdivision (a), a trial court may revoke a person's release on probation "if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation . . . officer or otherwise that the person has violated any of the conditions of his or her supervision." Trial courts have "very broad discretion in determining whether a probationer has violated

probation," and such a violation need only be proven by a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 443 (*Rodriguez*).) Thus, " 'only in a very extreme case should an appellate court interfere with the discretion of the trial court in the matter of denying or revoking probation.' " (*Ibid.*, quoting *People v. Lippner* (1933) 219 Cal. 395, 400.)

Factual findings underlying a trial court's probation revocation order are reviewed for substantial evidence. (*People v. Butcher* (2016) 247 Cal.App.4th 310, 318.) "Under that standard, our review is limited to the determination of whether, upon review of the entire record, there is substantial evidence of solid value, contradicted or uncontradicted, which will support the trial court's decision." (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848 (*Kurey*).) Thus, "[i]f the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

Moreover, and as is particularly relevant to these proceedings, "the fact that evidence is 'circumstantial' does not mean that it cannot be 'substantial.' " (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548, overruled on an unrelated point in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574, 580.) Rather, relevant circumstantial evidence is admissible and "can be substantial evidence for an inference based on it." (*Norris v. State Personnel Bd.* (1985) 174 Cal.App.3d 393, 398; see *Hasson*, at p. 548.) Indeed, a trier of fact "is entitled to accept persuasive circumstantial evidence even where contradicted by direct testimony." (*Hasson*, at p. 548; see *Scott v. Burke* (1952) 39 Cal.2d 388, 398 ["circumstantial evidence may outweigh, in convincing force, both the strongest of disputable presumptions . . . and direct evidence as well"].) Such evidence can thus provide the "sole basis" for a determination and "can meet the

substantial evidence test on appeal." (*Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1110 (*Ensworth*).)

Finally, "[p]roof of age, like proof of any other material fact, can be accomplished by the use of either direct or circumstantial evidence, or both." (*Kurey*, *supra*, 88 Cal.App.4th at p. 847.) And " '[e]xperience teaches us that corporal appearances are approximately an index of the *age* of their bearer, particularly for the marked extremes of old age and youth. In every case such evidence should be accepted and weighed for what it may be in each case worth. In particular the *outward physical* appearance of an alleged minor may be considered in judging of his *age*.' " (*People v. Montalvo* (1971) 4 Cal.3d 328, 335 (*Montalvo*).)

Here, Detective Kirkham testified that he had received "specialized training" from Alcohol Beverage Control regarding "sting operations concerning alcohol being sold to minors" and had conducted this type of operation "no less than 25" times. He further testified, based on his knowledge of Shoulder Tap Operations, that the age limit for the minor decoys used in such operations is 20 years of age. Indeed, if a decoy "was 20 [years old], and one day, he wouldn't be able to participate in the operation." Finally, according to Detective Kirkham, Curtis, although six feet tall, "was dressed in attire similar to kids his age, so he didn't look like someone who was 21 years of age." The trial court acknowledged that Detective Kirkham had significant training in Shoulder Tap Operations and had conducted a number of them and, finding that he "testified credibly that . . . there [was] an age limit to the participation," concluded that this provided the requisite evidence that Curtis was under 21.

We agree that Detective Kirkham's testimony constituted substantial, albeit circumstantial, evidence that Curtis was under 21 years of age at the time of the challenged sting operation. His testimony included both evidence of the age requirements for the decoy program and his personal perceptions of Curtis's outward appearance. (See *Montalvo*, *supra*, 4 Cal.3d at p. 335; *Kurey*, *supra*, 88 Cal.App.4th at

p. 847.) Barrett's argument that some form of direct evidence was necessary to provide substantial evidence of Curtis's age is contrary to precedent. (*Kurey*, at p. 847; *Ensworth*, *supra*, 224 Cal.App.3d at p. 1110.) Moreover, his complaint that the testimony failed to describe departmental policy for the ongoing verification of a decoy's age or indicate how officers ensure a decoy's age prior to a specific sting operation at most went to the weight of the evidence. But Barrett ignores the fact that the trial court specifically found Detective Kirkham credible on this point, while expressly finding all of Barrett's own testimony not credible. In addition, the probation violation at issue only required proof by a preponderance of the evidence. (*Rodriguez*, *supra*, 51 Cal.3d at p. 443.) Certainly, Detective Kirkham's testimony established that it was more likely than not that Curtis was under the age of 21 on the date in question. We see no error.

III. DISPOSITION

The trial court's probation violation order is affirmed.

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Sanchez, J.

WE CONCUR:

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Margulies, Acting P. J.

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Banke, J.